TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 368. 1088 10

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

T. R. EUBANK, DOING BUSINESS UNDER THE NAME OF T. R. EUBANK & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF SIMPSON COUNTY, STATE OF KENTUCKY.

FILED JULY 26, 1899.

(17,476.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 362

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vs.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 12, 1900.

1 STATE OF KENTUCKY, }
County of Simpson. }

Pleas before the Hon. I. H. Goodnight, judge of the Simpson county circuit court of Ky., at a court held at the court-house, in the city of Franklin, Ky.

T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Record.

Be it remembered that heretofore, to wit, on the 9th day of June, 1899, the plaintiff herein filed in the clerk's office of the court aforesaid *their* petition herein, which is as follows, to wit:

Simpson Circuit Court.

T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD Company, Def't. } Petition — Ordinary.

The plaintiff, T. R. Eubank, doing business under the firm name of T. R. Eubank & Co., states that the defendant, The Louis-
2 ville and Nashville Railroad Company, is now and was at the times hereinafter complained of a corporation, duly chartered under the laws of the Commonwealth of Kentucky as a common carrier of both freight and passengers, and among other powers has the privilege of suing and being sued in its corporate name; that the defendant owns and operates and owned and operated at the times hereinafter complained of a line of railway for the transportation of freight and passengers from Nashville, Tenn., running north through Franklin, Ky., and continuing on to Louisville, Ky., a distance of one hundred and eighty-five miles; that the distance from Franklin, Ky., to Louisville, Ky., over defendant's said line is one hundred and thirty-four miles, and is included in and a part of the distance from Nashville, Tenn., to Louisville, Ky.; that — the times hereinafter complained of the defendant's rate for transportation of tobacco shipped by the hogshead from Nashville, Tenn., to Louisville, Ky., over the said line from Nashville, Tenn., was (12) twelve cents per one hundred pounds, and at the times hereinafter complained of divers persons and the public generally shipped tobacco by the hogshead from Nashville, Tenn., to Louisville, Ky., over the defendant's said line at the rate of (12) twelve cents per one hundred pounds, and no greater charge or rate was made or exacted or collected by the defendant.

That between Feb'y 23, 1897, and May the 5, 1897, the plaintiff shipped to Grinter & Co., at Louisville, Ky., over defendant's said line from Franklin, Ky., (18) eighteen hogsheads of tobacco,
3 aggregating 31,310 pounds. An itemized statement is filed herewith and marked Exhibit "A."

Upon Feb'y 27, 1897, the plaintiff shipped to the People's warehouse, at Louisville, Ky., over defendant's said line, from Franklin, Ky., one hogshead of tobacco, weighing 1,950 pounds, an itemized statement of which is filed herewith, marked Exhibit "B."

That between Jun- 19, 1897, and July 15, 1897, the plaintiff shipped to Rice and Turner, Louisville, Ky., over defendant's said line, from Franklin, Ky., (17) seventeen hogsheads of tobacco, aggregating 30,280 pounds, an itemized statement of which is filed herewith and marked Exhibit "C"; that between Jan'y 25, 1898, and Aug. 1, 1898, the plaintiff also shipped to Rice & Turner, at Louisville, Ky., over the defendant's said line, from Franklin, Ky., (43) forty-three hogsheads of tobacco, aggregating 81,705 pounds, an itemized statement of which is filed herewith and marked Exhibit "D."

That all of said shipments of tobacco amount to 145,245 pounds.

That upon all of said tobacco shipped as aforesaid the defendant unlawfully, willfully, and knowingly charged and exacted freight at the r. e of (25c.) twenty— cents per one hundred pounds, which freight rate the plaintiff paid to the defendant and which freight rate of 25c. per 100 pounds the defendant unlawfully, willfully, and knowingly received, and which amounted in the aggregate
4 & 5 to $363.11, which plaintiff paid the defendant for transporting said tobacco, aggregating 145,245 pounds, from Franklin, Ky., to Louisville, Ky.

That during all the time the plaintiff was shipping said tobacco to Louisville, Ky., from Franklin, Ky., the defendant's rate for tobacco from Nashville, Tenn., to Louisville, Ky., shipped in the same manner and under similar circumstances and conditions as plaintiff's said tobacco, was (12c.) twelve cents per 100 pounds, as above stated in *their* petition.

That the defendant had no right to charge, exact, collect, or receive from the plaintiff a greater freight rate for the said tobacco which the plaintiff shipped, as aforesaid, from Franklin, Ky., to Louisville, Ky., than (12c.) twelve cents per (100) one hundred pounds.

That the defendant unlawfully, willfully, and knowingly charged, exacted, collected, and received as freight for the transportation of said tobacco from Franklin, Ky., to Louisville, Ky., as aforesaid (13 cents per 100), $188.81 more than *they* had the lawful right to charge, exact, collect or receive of this plaintiff, for the defendant during said time and at no time had been authorized by the railroad commission of this Commonwealth of Kentucky to charge less for the transportation of tobacco from Nashville, Tenn.,
6 to Louisville, Ky., nor had they authorized a greater charge for the transportation of tobacco from Franklin, Ky., to Louisville, Ky., than from Nashville, Tenn., to Louisville, Ky., than

defendant charged for the transportation of tobacco from Franklin, Ky., to Louisville, Ky.

The plaintiff further says that the defendant has failed and refused to refund to this plaintiff said sum of one hundred and eighty-eight & $\frac{80}{100}$ dollars or any part thereof.

Wherefore the plaintiff asks for a judgment against the defendant for the sum of one hundred and eighty-eight and $\frac{81}{100}$ dollars and the cost of this cause.

ROARK & FINN,
Att'ys for Pl'ff.

Exhibits A, B, C, & D were filed with the foregoing petition; which exhibits are as follows, to wit:

7 T. R. Eubank & Co. shipped to Rice & Turner, Louisville, Ky.

'98.				
Jan'y 28.	Hogshead	# 1		1,860
	"	" 2		2,100
	"	" 3		1,665
	"	" 4		1,810
	"	5		1,860
	"	6		1,770
	"	7		1,840
	"	8		1,720
	"	9		1,785
	"	10		1,860
	"	11		1,930
Feb'y 26.	"	12		1,800
	"	13		1,855
	"	14		2,425
	"	15		1,810
M'ch 15.	"	16		2,010
May 4.	"	17		2,150
		18		1,740
		19		2,150
		20		2,140
		21		1,900
		22		1,900
* May 14.		23		2,100
		24		1,680
		25		1,800
				47,680

8 T. R. Eubank & Co. to Rice & Turner, Louisville, Ky.

CONTR.

		Am't for'd		47,680
1898.				
* May 14.	Hogshead	No.	26	2,010
	"	"	27	2,010
* May 23.	"	"	28	1,800
	"	"	29	1,750
	"	"	30	1,710
* Jun- 7.	"	"	31	1,890
	"	"	32	1,735
July 2.	"	"	33	2,150
	"	"	34	1,910
* July 29.	"	"	35	1,860
	"	"	36	1,800
	"	"	37	1,875
	"	"	38	1,810
	"	"	39	1,810
	"	"	40	1,890
	"	"	41	2,100
	"	"	42	2,055
	"	"	43	1,860
				81,750

Exhibit "D."

9 C. T. Eubank & Co. to Rice & Turner, Lou., Ky.

1897.				
Jun- 21.	Hogshead	No.	19	1,710
			20	1,775
			21	1,740
			22	1,865
			23	1,825
			24	1,740
July 6.			25	1,900
			26	1,755
			27	1,855
			28	1,715
			29	1,730
			30	1,960
			31	1,855
			32	1,900
			33	1,540
			34	1,645
			35	1,770
				30,280

Exhibit "C."

To Rice & Turner.

10 C. T. Eubank & Co. to People's Warehouse, Louisville, Ky.

1897.			
Feb'y	27.	Hogshead No. 1	1,950

Exhibit "B."

11 C. T. Eubank & Co. shipped to Grinter & Co., Louisville, Ky.

1897				
Feb'y	24.	Hogshead	No. 1	1,635
		"	" 2	1,620
	26.	"	" 3	1,810
M'ch	13.	"	" 4	1,910
			5	1,925
			6	1,975
M'ch	23.	"	" 7	1,900
			8	2,000
			9	1,850
			10	1,800
Apr.	9.	"	" 11	1,725
			12	1,770
			13	1,700
Apr.	26.	"	" 14	1,410
			15	1,710
Apr.	23.		16	1,560
			17	1,710
May	4.		18	1,700
				31,310

Exhibit "A."

12 At the time of filing of said petition herein a summons was issued, which is as follows, to wit:

The Commonwealth of Kentucky to the sheriff of Simpson county, Greeting:

You are commanded to summons The Louisville and Nashville Railroad Company to answer, on the first day of the next June term of the Simpson circuit court, a petition filed against it in said court by T. R. Eubank, doing business under the name of T. R. Eubank & Company, and warn it that upon its failing to answer the petition will be taken for confessed, or it will be proceeded against for contempt; and you will make due return of this summons on the first day of the next June term of said court.

Witness E. S. Bradshaw, clerk of said court, this 9th. day of June, 1899.

E. S. BRADSHAW, *Clerk.*

Upon said summons was made the following return, to wit:

Executed by delivering to S. A. Murray, agent for the Louisville and Nashville Railroad Co., a true copy of the within summons this June 9th, 1899.

W. S. McCLANAHAN, *S. S. C.*
W. W. McCLANAHAN, *D. S.*

13 At a court held, as aforesaid, on the 23rd day of June, 1899, the following order was entered herein, to wit:

On this day came defendant, by its attorneys, and tendered special and general demurrers to the petition; which demurrers are ordered to be and are now filed.

Which demurrers filed herein *is* as follows, to wit:

Simpson Circuit Court.

T. R. EUBANK, Plaintiff, vs. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	Special and General Demurrers.

1. The defendant demurs specially to the petition herein because the court has not jurisdiction of the subject of the action, and in this behalf the defendant says that said action necessarily involves and depends upon the legality of the rate charged by it from Nashville, Tennessee, to Louisville, Kentucky, which is an interstate rate, and therefore, under section 9 of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, only the Interstate Commerce Commission or a district or circuit court of the United States has jurisdiction of the subject of the action, so far as said rate from Nashville, Tennessee, to Louisville, Kentucky, may be concerned.

14 2. The defendant demurs to the petition herein because it fails to state facts sufficient to constitute a cause of action.

3. The defendant demurs to the petition herein because it seeks to make a law of the State of Kentucky applicable to a rate charged by the defendant from Nashville, Tennessee, to Louisville, Kentucky, whereas such law, if so construed, would become a regulation of interstate commerce, and would therefore be invalid, because in conflict with and repugnant to subsection 3 of section 8 of article I of the Constitution of the United States and said act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce."

Wherefore defendant prays, &c.

WALKER D. HINES,
C. W. MILLIKEN,
J. A. MITCHELL,
For Defendant.

At a court held, as aforesaid, on the 26th day of June, 1899, the following order was entered herein, to wit:

The court, being advised upon the defendant's special and general demurrers to the petition herein, orders and adjudges that said demurrers be, and they are hereby, overruled; to which decision the defendant excepts, and thereupon defendant tendered its answer, which is ordered to be and is now filed.

15 Which answer filed herein is as follows, to wit:

Simpson Circuit Court.

T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant. } Answer.

Paragraph 1.

The defendant admits that at the time stated in the petition its nominal rate for the transportation of tobac-o by the hogshead, shipped from Nashville, Tenn., to Louisville, Ky., was 12 cents per *per* hundred pounds, but denies that at the times complained of in the petition divers persons or the public general-y shipped tobac-o by the hogshead from Nashville, Tenn., to Louisville, Ky., over the defendant's said line, at the rate of 12 cents per hundred pounds, and in this behalf this defendant says that during all of said time only 12 hogsheads of tobacco were transported by it from Nashville, Tenn., to Louisville, Ky., and that said 12 hogsheads of tobacco were all transported in the month of February, 1897, and, while said rate of 12 cents per hundred pounds has remained nominally in effect ever since that time, as a matter of fact no tobacco has been shipped upon that or any other rate from Nashville, Tenn.,

16 to Louisville, Ky., and defendant says that the said 12 hogsheads of tobacco so transported by it from Nashville, Tenn., to Louisville, Ky., in February, 1897, weighed 20,910 pounds, and that the revenue derived by it therefrom at the said rate of 12 cents per hundred pounds was only $25.09.

Defendant denies that between February 23, 1897, and May 5, 1897, or between any other dates, plaintiff shipped to Grinter & Co., at Louisville, Kentucky, over the defendant's line from Franklin, Kentucky, 18 hogsheads of tobacco, aggregating 31,310 pounds, or any tobacco except 15 hogsheads, aggregating 26,515 pounds; but def't admits that during said period pl'ff shipped to the Growers' warehou- at Louisville, Ky., 3 hogsheads, aggregating 4,815 pounds. Defendant admits that on February 27, 1897, the plaintiff shipped to the People's warehouse at Louisville, Kentucky, over the defendant's said line from Franklin, Kentucky, one hogshead of tobacco weighing 1,950 pounds. Defendant denies that between June 19, 1897, and July 15, 1897, or between any other dates or any other time, the plaintiff shipped to Rice and Turner, at Louisville,

Kentucky, over defendant's said line from Franklin, Kentucky, 17 or any other number of hogsheads of tobacco, aggregating 30,280 pounds or any other weight, or that between January 25, 1898, and August 1, 1898, or between any other dates or at any other time, the plaintiff shipped to Rice & Turner, at Louisville, Ky., over the defendant's said line from Franklin, Ky., 43 hogsheads of tobacco or any other number of hogsheads of tobacco, aggregating
17 81,705 pounds or any other weight; but defendant admits that between June 19, 1897, and July 15, 1897, the plaintiff shipped to Rice and Givings, at Louisville, Ky., from Franklin, Ky., 17 hogsheads of tobacco, aggregating 30,280 pounds, and admits that between January 25th, 1898, and August 1, 1898, plaintiff shipped to Rice & Givings, at Louisville, Ky., from Franklin, Ky., 43 hogsheads of tobacco, aggregating 81,687 pounds.

Defendant admits that all of said shipments of tobacco amounted to 145,245 pounds.

Defendant denies that upon all or any of said tobacco shipped, as aforesaid, or as alleged in the petition, the defendant unlawfully or willfully charged or exacted freight at the rate of 25 cents per hundred pounds. Defendant admits that it lawfully and rightfully charged upon all of the above-mentioned tobacco freight at the rate of 25 cents per hundred pounds, but denies that said freight was paid to the defendant by the plaintiff, and denies that said rate of 25 cents per hundred pounds was unlawfully or willfully received by the defendant, and denies that said freight, at the rate of 25 cents per hundred pounds, amounted in the aggregate to $363.11, but admits that said freight amounted to $346.23; but denies that the same was paid by the plaintiff to the defendant, and denies that it was paid for transporting tobacco aggregating 145,245 pounds, but admits that it was paid for transporting tobacco aggregating 138,482 pounds.

18 Defendant denies that during all or any of the times plaintiff was shipping said tobacco to Louisville, Ky., from Franklin, Ky., defendant's rate for tobacco from Nashville, Tennessee, to Louisville, Ky., under similar circumstances and conditions as the plaintiff's said tobacco, was 12 cents per hundred pounds, and in this behalf the defendant says that the circumstances and conditions under which tobacco was shipped from Nashville, Tennessee, to Louisville, Ky., during all of said times *was* substantially and essentially dissimilar from the circumstances and conditions under which plaintiff shipped tobacco from Franklin, Ky., to Louisville, Ky.

Defendant denies that it had no right to charge, exact, collect, or receive from the plaintiff or anybody else a greater freight rate for the said tobacco shipped by plaintiff, as above stated or as alleged in the petition, from Franklin, Ky., to Louisville, Ky., than 12 cents per *per* hundred pounds, and denies that the defendant unlawfully, willfully, or knowingly charged, exacted, collected, or received as freight for the transportation of said tobacco from Franklin, Ky., to Louisville, Ky., as aforesaid, 13 cents per hundred pounds, or any amount per hundred pounds, or $188.81, or any other amount, more

than it had the lawful right to charge, exact, collect, or receive of plaintiff or any other person.

Defendant admits that during the times named in the petition and at no time had it been authorized by the railroad commission of the Commonwealth of Kentucky to charge less for the transportation of tobacco from Nashville, Tennessee, to Louisville, Ky., than it charged for the transportation of tobacco from Franklin, Ky., to Louisville, Ky., or a greater charge from Franklin to Louisville than from Nashville to Louisville, and in this behalf defendant says that the railroad commission of Kentucky was and is without jurisdiction in the premises to authorize or supervise the charging of any rate whatever from Nashville, Tennessee, to Louisville, Kentucky.

19

Paragraph 2.

Further answering, defendant says that its said rate of 12 cents per hundred pounds for the transportation of tobacco from Nashville, Tennessee, to Louisville, Ky., was made under and in conformity with the act of Congress of February 4, 1887, entitled "An act regulating commerce," and under the acts amendatory thereof; that in pursuance of section 6 of said act the said rate was duly printed, posted, and kept open to public inspection, and was duly filed with the Interstate Commerce Commission, and that by virtue of said act it would have been unlawful for the defendant to have charged either more or less than the said rate of 12 cents per hundred pounds from Nashville, Tennessee, to Louisville, Ky.

Defendant further says that if the plaintiff has any cause of complaint on account of said rate from Nashville of Louisville the courts of the United States and the Interstate Commerce Commission have jurisdiction of said complaint, which jurisdiction is exclusive of the State courts.

20

Defendant further says that the Kentucky laws upon the subject of long and short hauls—that is, section 218 of the constitution and section 820 of the Kentucky statutes—apply only to a railroad in the State of Kentucky, and have no application whatever in any respect to such portion of the railroad as may be without the State of Kentucky, and have therefore no application whatever to that portion of the defendant's railroad between Nashville, Tennessee, and the State line between Tennessee and Kentucky, and that the rates which the defendant may charge from Franklin, Ky., to Louisville, Ky., are not and cannot become unlawful under the long and short haul laws of Kentucky by reason of any rates that may be charged by the defendant upon traffic transported from Nashville, Tenn., to Louisville, Ky.

Defendant further says that the long and short haul laws of Kentucky can apply only when both the long and short hauls which may be involved are within Kentucky, and that the hauls from Nashville, Tenn., to Louisville, Ky., are not and cannot be within the jurisdiction of Kentucky.

Defendant further alleges that at the times named in the petition it charged no rate on tobacco to Louisville, Ky., from

21

any point in the State of Kentucky on the same line with Franklin and farther from Louisville than Franklin less than the rate of 25 cents per hundred pounds charged by it from Franklin to Louisville.

Defendant says that if the laws of Kentucky are so construed as to make the defendant's said rate of 25 cents per hundred pounds from Franklin, Ky., to Louisville, Ky., unlawful by reason of the less rate charged by it from Nashville, Tenn., to Louisville, Ky., the result would be to regulate commerce among the States by the long and short haul laws of Kentucky, and to compel the defendant to and it would raise its rate of 12 cents per hundred pounds from Nashville, Tenn., to Louisville, Ky., unless it could obtain the authority from the railroad commission of Kentucky to charge the less rate from Nashville, Tenn., to Louisville, Ky.; that thereby the said long and short haul laws of Kentucky would regulate commerce among the States and would be in conflict with and repugnant to the said act of Congress entitled "An act to regulate commerce," and in conflict with and repugnant to subsection 3 of section 8 of article 1 of the Constitution of the United States, and would therefore be void; and the defendant hereby sets up, pleads, and relies on the right and privilege secured to it by the said act
22 of Congress and by said provisions of the Constitution of the United States to have its interstate traffic and the commerce conducted among the States and between Kentucky & Tennessee regulated by the Constitution and laws of the United States and to be free from the regulation and interferance of the constitution and laws of the State of Kentucky.

Paragraph 3.

Without waiving, but especially relying upon, the defenses set up in paragraph 2, defendant says that if any cause of action ever accrued by reason of the shipments of tobacco which are admitted in paragraph 1 and the rates charged therefor, said cause of action with respect to the 15 hogsheads of tobacco shipped to Grinter & Co., and with respect to the one hogshead of *of* tobacco shipped to the People's warehouse, and with respect to the freight collected thereon, accrued more than two years before the institution of this action, and is therefore barred by the statutes of limitation, for much more than two years have elapsed since the shipments of said tobacco, or any part of it, and since the freight charges thereon were paid, and defendant therefore pleads and relies upon the two years' statute of limitation in such cases made and provided in bar of plaintiff's right to recover any sum whatever against the defendant on account of said shipments of tobacco.

23 Paragraph 4.

Without waiving, but expressly relying upon, the defenses set up in paragraphs 2 and 3, defendant says that its rate on tobacco from Franklin to Louisville during all the times stated in the petition was much less than the defendant's standard tariff rates for that

distance, and that such less rate resulted from and was necessitated by the fact of competition existing at Franklin, Ky. Said competition arose from the fact that tobacco could be and was hauled by wagon from Franklin, Ky., to Bowling Green, Ky., and then shipped to Louisville on boats plying the Green and Barren and Ohio rivers at extremely low rates of transportation, and on account of competition the defendant had to and did accept said rate of 25 cents per hundred pounds, whereas but for that competition the defendant would and could have charged a much higher rate, which higher rate would have been just and reasonable, and said rate of 25 cents per hundred pounds was just and reasonable. Defendant further says that Nashville is situated on the Cumberland river, which is and was at all of said times navigated by numerous boats plying between Nashville and various points on the Ohio river, including Louisville, which said boats at all times offered to and did transport tobacco from Nashville to many places, including Louisville, at extremely low rates of transportation; that by reason of this water competition
24 Nashville enjoyed extremely low rates for shipment of tobacco to Louisville and many other places, and if defendant, at any of the times mentioned, had charged more for the transportation of tobacco from Nashville, Tenn., to Louisville, Ky., than 12 cents per hundred pounds, it would not have secured the transportation of any of said tobacco from Nashville to Louisville, but the same would have been shipped from Nashville to Louisville, or some other tobacco market, at extremely low rates of transportation by water and at rates less than 12 cents per 100 pounds, and thereby defendant would have lost wholly the transportation of any tobacco from Nashville to Louisville, and in fact the defendant succeeded in obtaining, even at the low rate of 12 cents per hundred pounds, the transportation of only 12 hogsheads of tobacco during the time named in the petition, and that was in February, 1897.

Defendant says that said tobacco transported by it from Nashville to Louisville was transported under the circumstances and conditions hereinbefore set out, and that none of the same could have been transported at any higher rate than the rate of 12 cents per hundred pounds; that at none of the times mentioned in the petition was the transportation of tobacco from Franklin to Louisville under or affected by the circumstances or conditions heretofore set out as affecting the transportation of tobacco from Nashville to Louisville; that so far as similar competition existed at
25 Franklin it was recognized by the defendant, but that the competition at Nashville differed substantially from the competition at Franklin, in that it was far more effective and necessitated a much lower rate, and that in making the difference in the rates between Franklin and Nashville the defendant simply recognized the substantial difference in the circumstances and conditions of the transportation from and to the said two places.

Defendant further says that it was to its advantage to transport such tobacco as it could secure from Nashville to Louisville at the rate of 12 cents per hundred pounds rather than to lose such trans-

portation altogether, as it would have done if it had attempted to charge more than said rate of 12 cents per hundred pounds; that the fact that it did transport tobacco from Nashville to Louisville at 12 cents per hundred pounds did not increase the rate that it charged from Franklin to Louisville or make the rate from Franklin to Louisville any higher than it would otherwise have been. Defendant further says that if it had refused to transport tobacco from Nashville to Louisville for any less rate than the rate charged from Franklin to Louisville, shippers at Nashville could and would have still shipped their tobacco to Louisville, or to other tobacco markets, over routes which this defendant could not control and at rates not exceeding 12 cents per hundred pounds, and most of such shippers, if any, seem to have done so. Defendant further says that it
26 could and did engage in the transportation of tobacco from Nashville to Louisville at said rate of 12 cents per hundred pounds, as above stated, without in anywise injuring Franklin or any person or interest at Franklin.

Defendant further states that it was duly incorporated by an act of the General Assembly of the Commonwealth of Kentucky entitled An act to incorporate the Louisville & Nashville Railroad Company, which was approved and became a law on the 5th day of March, 1850; that by virtue of said incorporation and the charter thereby granted to this defendant it acquired a contract right from the Commonwealth of Kentucky to operate a railroad and to engage in all manner of legitimate railroad business; that its engaging in the tobacco business between said Nashville & Louisville, as above stated, at the rate which it was compelled to charge for that business, was a legitimate railroad business and not injurious to any person; and if the law of Kentucky is so construed as to require it either to withdraw from that business or to reduce all other rates on tobacco to Louisville from points between Nashville & Louisville to the same low basis, regardless of any inquiry into their reasonableness, and when, in fact, they are reasonable, saving only an arbitrary and final power in the Railroad Commission of Kentucky, not subject to judicial review, to relieve from the operation of such requirement, such law would be an arbitrary requirement and an arbitrary interference with its legitimate railroad business,
27 not promoting or tending to promote or in anywise related to or connected with the general welfare of the State or the welfare of any person in the State, and would, therefore, impair the obligation of the aforesaid contract between the defendant and the Commonwealth of Kentucky, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States.

Defendant further states that if the law of Kentucky should be so construed as to deprive it of the right to use its property in the business of transporting tobacco from Nashville to Louisville under the circumstances above stated, or to require it to reduce its other rates to the same low competitive basis as above stated, saving only an arbitrary and final power in the Railroad Commission of Kentucky, not subject to judicial review, to relieve from the operation of such requirement, it would be an arbitrary requirement, not

promoting or tending to promote or in anywise related to or connected with the general welfare of the State or the welfare of any person in the State, and would, therefore, in effect, deprive the defendant of the right to use its property and of its property itself without due process of law, and would deny the defendant the equal protection of the law, contrary to section 1 of article 14 of the amendments to the Constitution of the United States.

Defendant further says it has many lines in and out of
28 Kentucky on which are tobacco shipping stations about the same distance from Louisville as Franklin, Ky., which other stations are not on the line between Nashville and Louisville, which are entitled to and enjoy substantially the same rates as Franklin, and that if said law were so construed as to require a reduction in the tobacco rates between Nashville and Louisville, so as not to exceed the rate from Nashville to Louisville, it would still require no reduction in other rates for similar distances to Louisville, Ky., not happening to be on the same line as Nashville, and the result would be that places on the same line with Nashville and nearer to Louisville would be given an arbitrary and unreasonable advantage over other places at the same distance from Louisville not on that line; that such result would work an undue and unreasonable prefference in favor of places on the line between Nashville and Louisville and against all other places not on that line, and that the law bringing about such a result would be an unreasonable exercise of power on the part of the State and would impair the obligation of the aforesaid contract between the defendant and the Commonwealth of Kentucky, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, and would deprive the defendant of the right to use its property and its property itself without due process of law, and would deny to the defendant the equal protection of the law, contrary to section 1 of article 14 of the
29 amendments to the Constitution of the United States.

Defendant *d*urther says that the law of Kentucky so construed would necessarily involve an unlawful interference with commerce between the States, in conflict with subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with the act of Congress of February 4, 1887, entitled "An act to regulate commerce," because the law of Kentucky so construed would be directly contrary in effect to the same provision which has been adopted by Congress in said act for the government of long and short haul interstate traffic, and would necessarily disturb the commercial relations which do and ought to exist between points in Kentucky and adjoining States, and would seriously interfere with the due and proper regulations of commerce between the States.

Defendant therefore says that the laws of Kentucky construed so as to prohibit the legitimate adjustment of rates herein described would be in conflict with and repugnant to the above-mentioned provisions of the Constitution of the United States and said act of Congress entitled "An act to *to* regulate commerce," and defendant hereby specially sets up, pleads, and relies upon the rights, immu-

nities, and privileges guaranteed to it by the said provisions of the Constitution of the United States and by the said act of Congress.

Wherefore the defendant prays the court to dismiss the
30 petition and prays judgment for costs and for all proper relief.

WALKER D. HINES.
C. W. MILLIKEN.
J. A. MITCHELL.

At a court held, as aforesaid, on the 26th day of June, 1899, the following order was entered herein, to wit:

Came pl'ff, by att'y, and filed demurrer to paragraph- 2, 3, and 4 of the defendant's answer herein.

Which demurrer is as follows, to wit:

Simpson Circuit Court.

T. R. EUBANK, &c., Pl'ff, } Demurrer.
vs.
L. & N. R. R. Co., Def't. }

Comes the plaintiff and demurs to paragraphs 2, 3, and 4 of the defendant's answer herein, because the facts stated in said paragraph and each of said paragraphs are insufficient in law to constitute any defense to plaintiff's petition and the allegations therein contained. Wherefore pl'ff prays that said paragraphs of said answer be adjudged as insufficient.

ROARK & FINN.

31 At a court held, as *as* aforesaid, *of* the 26th day of June, 1899, the following order was entered herein, to wit:

The court, being advised upon the plaintiff's demurrer to the 2nd, 3rd, and 4th paragraphs of the defendant's answer, orders and adjudges that said demurrer be sustained; to which decision the defendant excepts.

At a court held, as aforesaid, on the 26th day of June, 1899, the following order was entered herein, to wit:

Came the plaintiff in open court and *and* filed reply to the def't's answer; to which reply the defendant refused and failed to rejoin.

Which reply filed herein is as follows, to wit:

Simpson Circuit Court.

T. R. EUBANK, &c., Pl'ff, } Reply.
vs.
L. & N. R. R. Co., Def't. }

The plaintiff, for reply to the answer of the defendant filed herein, admits that the shipment of tobacco between June 18, 1897, and July 15, 1897, was to Rice & Givings instead of Rice and
32 Turner, but the plaintiff denies that the 43 hogsheads of tobacco shipped between Jan'y 25, '98, and Aug. 1, 1898, was

shipped to Rice & Givings or any person or firm other than Rice and Turner. The plaintiff states that all the freight upon the tobacco shipped, as set forth in the pl'ff's petition, was paid for plaintiff by the parties to whom the tobacco was consigned and deducted by said consignees from the proceeds of the sale of said tobacco.

The plaintiff denies that the circumstances and conditions under which the tobacco was shipped from Nashville, Tenn., to Louisville, Ky., *was* essentially dissimilar or dissimilar at all to the conditions and circumstances under which said tobacco was shipped from Franklin, Ky., to Louisville, Ky.

Wherefore the plaintiff prays as in the original petition.

ROARK & FINN, *Att'ys.*

At a court held, as aforesaid, on the 26th day of June, 1896, the following judgment was entered herein, to wit:

33 Simpson Circuit Court.

T. R. EUBANK & Co., Pl'ff,
vs.
L. & N. R. R. Co., Def't. } Judgment.

In the above cause the plaintiff moves the court for judgment for the plaintiff upon the pleadings and exhibits filed; to which motion the defendant, by attorney, objects, and the court, being sufficiently advised, is of opinion and so adjudges that the plaintiff's motion should be sustained, and it is therefore ordered and adjudged by the court that the plaintiff recover of the defendant, The Louisville & Nashville Railroad Company, the sum of one hundred and eighty-eight and $\frac{81}{100}$ dollars and his costs herein expended, for which execution may issue; to all of which the defendant excepts and objects.

34 On first day of July, 1899, the defendant and plaintiff in error filed in the office of the clerk of the Simpson circuit court its writ of error (a copy of which remains on file in said clerk's office) as follows:

35 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the Simpson circuit court of Kentucky and to the judge thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Simpson circuit court, before the judge thereof, being the highest court of law or equity of the said State in which a decision could be had in the said suit between T. R. Eubank, doing business under the name of T. R. Eubank & Company, plaintiff, and The Louisville & Nashville Railroad Company, defendant, wherein was drawn in question the validity of a

statute of the United States and the decision was against its validity, or wherein was drawn in question the validity of a statute or constitution of or an authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a statute of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution or statute, a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

THOS. SPEED,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Allowed by—
I. H. GOODNIGHT,
Judge of the Simpson Circuit Court of Kentucky.

[Endorsed:] Louisville & Nashville Railroad Company, plaintiff in error, *vs.* T. R. Eubank, doing business, &c., def't in error. Writ of error. Filed in office July 1st, 1899. E. S. Bradshaw, C. S. C. C.

36 On the same day, to wit, July 1, 1899, the plaintiff in error filed in said clerk's office its bond as follows:

37

Bond.

Simpson Circuit Court.

T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Know all men by these present that the Louisville & Nashville Railroad Company, principal, and Walker D. Hines, surety, are held and firmly bound unto the above-named T. R. Eubank in the sum of $500.00, to be paid to the obligee herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 1st day of July, 1899.

Whereas the above-named Louisville & Nashville Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above cause by the Simpson circuit court of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville railroad shall prosecute its said writ of error to effect and, *and* if it shall fail to make good,
38 its plea, answer the whole amount of the judgment therein, including the just damage for delay and all costs and interest, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By WALKER D. HINES, *Attorney.* [L. S.]
WALKER D. HINES. [L. S.]

Sealed and delivered in the presence of and approved by—
I. H. GOODNIGHT,
Judge of the Simpson Circuit Court of Kentucky.

On the same day, to wit, July 1, 1899, the plaintiff in error filed its assignment of errors in said clerk's office as follows:

39 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD Company, Plaintiff in Error,
v.
T. R. EUBANK, Doing Business under the Name of T. R. Eubank & Company, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

The Louisville and Nashville Railroad Company, plaintiff in error in the above-entitled cause, complains of the judgment rendered therein by the Simpson circuit court of Kentucky, and for error therein assigns the following:

First. The court erred in overruling the *the* defendant's special demurrer to the petition herein, and thereby said court decided against the validity of the statute of the United States therein set up and against the right therein set up and claimed under said statute.

Second. The court erred in overruling the defendant's general demurrer to the petition herein, based on the ground that said petition sought to make a law of the State of Kentucky, to wit, section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, applicable to a rate charged by the defendant from Nashville, Tennessee, to Louisville, Kentucky, whereas said law, if so construed, would become a regulation of interstate commerce and would therefore be invalid, because in conflict with and repug-

40 nant to subsection 3 of section 8 of article 1 of the Constitution of the United States and the act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and the amendments thereto, and thereby decided in favor of the validity of said section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, construed as aforesaid, notwithstanding their repugnancy *of* the Constitution and laws of the United States.

Third. The court erred in sustaining the plaintiff's demurrer to paragraph two of the defendant's answer herein, and thereby the court decided against the validity of said act to regulate commerce and its amendments and in favor of the validity of said section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, notwithstanding that, as construed by the court, they were and are and each of them was and is repugnant to and in conflict with subsection 3 of section 8 of article 1 of the Constitution of the United States and the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof; and the court thereby also decided against the right, title, privilege, and exemption specially set up and claimed by the defendant under said clause of the Constitution of the United States and under said statutes of the United States.

Fourth. The court erred in sustaining the plaintiff's de-

41 murrer to the fourth paragraph of the defendant's answer herein, and thereby the court held section 218 of the consti-

tution of Kentucky and section 820 of the Kentucky statutes to be valid, notwithstanding their repugnancy and the repugnancy of each of them to the provisions of the Constitution and statutes of the United States set up in the fourth paragraph of the defendant's answer for the reason set forth in said fourth paragraph of said answer; and thereby the court decided against the right, title, privilege, and exemption specially set up and claimed by the defendant in the fourth paragraph of said answer under the provisions of the Constitution and statutes of the United States set up in said fourth paragraph.

Fifth. The court erred in rendering judgment herein against the defendant, and thereby the court decided against the validity of said act of Congress entitled "An act to regulate commerce" and the amendments thereto and in favor of the validity of section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, although so construing said sections as to make them repugnant to and in conflict with the various provisions of the Constitution and statutes of the United States which had been set up in defendant's special and general demurrers to the petition and in the fourth paragraph of the defendant's answer, and thereby the court also decided against the right, privilege, and exemption which
42 had been set up, pleaded, and relied upon by the defendant in its said special and general demurrers and in the second and fourth paragraphs of its said answer under the provisions of the Constitution and statutes of the United States as set fourth in said special and general demurrers and in said second and fourth paragraphs of defendant's answer.

Sixth. The court erred in rendering the judgment sought to be reversed because it is contrary to the law of the controversy and in opposition to the rights of the said plaintiff in error secured to it by the Constitution and laws of the United States.

Wherefore it prays for a reversal of said judgment.

H. W. BRUCE,
WALKER D. HINES,
Attorneys for Plaintiff in Error.

43 COMMONWEALTH OF KENTUCKY, } *set:*
Simpson Circuit Court, }

I, E. S. Bradshaw, clerk of the Simpson circuit court of Kentucky, hereby certify that the preceding 42 pages contain a true & complete transcript of the record and proceedings had in said court in the action of T. R. Eubank, doing business under the name of T. R. Eubank & Co., plaintiff, *vs.* Louisville & Nashville Railroad Company, defendant, together with the original writ of error (a copy of which is on file in my office), a copy of the bond and assignment of errors, all of which appear of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of my office.

Seal Simpson Circuit Court, Kentucky.

Done at Franklin, Simpson county, Kentucky, this July 20th, 1899.

E. S. BRADSHAW,
Clerk Simpson Circuit Court of Kentucky.

Clerk's fee, $11.00.

44 UNITED STATES OF AMERICA:

The President of the United States to T. R. Eubank, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Simpson circuit court, wherein The Louisville & Nashville Railroad Company is plaintiff in error and T. R. Eubank, doing business under the name of T. R. Eubank & Company, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. H. Goodnight, judge of the Simpson circuit court of Kentucky, this 1st day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

I. H. GOODNIGHT,
Judge of the Simpson Circuit Court of Kentucky.

Service of this citation is hereby accepted July 1st, 1899.

T. R. EUBANK,
By ROARK & FINN,
G. W. ROARK,
G. T. FINN.
Attorneys for T. R. Eubank.

Endorsed on cover: File No., 17,476. Kentucky, Simpson circuit court. Term No., 362. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* T. R. Eubank, doing business under the name of T. R. Eubank & Company. Filed July 26th, 1899.

No. 108. 10

Brief of Bruce for P. C.

Office Supreme Court U. S.
FILED
OCT 2 1900
JAMES H. McKENNEY.
Clerk.

Filed Oct. 2, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 108.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

versus

T. R. EUBANK, DOING BUSINESS UNDER THE NAME OF T. R. EUBANK & CO., DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF SIMPSON COUNTY, STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

H. W. BRUCE,
WALKER D. HINES,
Counsel for Plaintiff in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 108.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

versus

T. R. EUBANK, DOING BUSINESS UNDER THE NAME OF T. R. EUBANK & COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case is here upon a writ of error to the Simpson Circuit Court of Kentucky, which is the highest court of the State in which a decision in the suit could be had, to review the judgment of that court against the plaintiff in error (hereinafter referred to as the Railroad Company) in favor of Eubank for $188.81, the difference between the rate of 25 cents per hundred pounds charged Eubank for 145,245 pounds of tobacco shipped by him from Franklin, Kentucky, to Louisville, Kentucky, and the published rate of the Railroad Company of 12 cents per hundred pounds charged for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, a longer distance over the same line of railroad, the less rate from Nashville, Tennessee, to Louisville, Kentucky, not having been authorized by the Railroad Commission of Kentucky.

The long and short haul law of the State of Kentucky is contained in Section 218 of the Constitution, which for brevity will be hereinafter referred to as "Section 218," and which reads as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Railroad Commission, such common carrier, or person, or

corporation owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section."

Section 820, Kentucky Statutes, makes it a misdemeanor to violate the constitutional prohibition, but has no bearing upon civil actions, and needs no further reference here.

The Railroad Company demurred specially to Eubank's petition, on the ground that the court was without jurisdiction with respect to the rate from Nashville to Louisville, exclusive jurisdiction in regard thereto being vested by Section 9 of the Interstate Commerce Act, in the Interstate Commerce Commission or a district or circuit court of the United States, and demurred generally to the petition, because it failed to state facts sufficient to constitute a cause of action; and because the laws of Kentucky, if so construed as to be applicable to the rate from Nashville to Louisville, would be a regulation of interstate commerce, and, therefore, void. The Court overruled the demurrers.

Thereupon the Railroad Company filed an answer in four paragraphs. Paragraph 1 admitted the rates from Nashville and Franklin and shipments from Franklin substantially as alleged in the petition.

In paragraph 2 the Railroad Company alleged that its 12-cent rate from Nashville to Louisville was made under and in conformity with the Interstate Commerce Act, and in pursuance of Section 6 of that act was duly printed, posted and kept open to public inspection, and was duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than 12 cents per hundred pounds on tobacco from Nashville to Louisville; that if the laws of Kentucky were so construed as to make its rate of 25 cents per hundred pounds on tobacco from Franklin to Louisville unlawful, by reason of the less rate from Nashville to Louisville, the result would be to regulate commerce among the States by the long and short haul laws of Kentucky, and to compel the defendant to, and it would, raise its rate of 12 cents per hundred pounds from Nashville to Louisville, unless it obtained authority from the Railroad Commission of Kentucky to charge the less rate from Nashville to Louisville, and that thereby the long and short haul laws of Kentucky would be in conflict with and repugnant to the Interstate Commerce Act and the Constitution of the United States. The court sustained a demurrer to paragraph 2.

Paragraph 3 pleaded the two years' statute of limitations with respect to a portion of the plaintiff's claim. It involved no Federal question. The court sustained a demurrer to this paragraph.

In paragraph 4 the Railroad Company alleged that its rate from Franklin to Louisville was just and reasonable; that the lower rate from Nashville was necessitated by water competition at Nashville; that its transporting tobacco at the lower rate from Nashville did not

increase the rate charged from Franklin to Louisville or give Nashville any advantage over Franklin, and was of value to the Railroad Company. After alleging the Railroad Company's charter contract right to operate a railroad and engage in all manner of legitimate railroad business in the State of Kentucky, this paragraph alleged that the Railroad Company's engaging in the tobacco business between Nashville and Louisville at the rate it was compelled to charge therefor was a legitimate railroad business, and not injurious to any person, and that if the laws of Kentucky were so construed as to require it either to withdraw from that business or to reduce all other rates on tobacco to Louisville from points between Nashville and Louisville to the same low basis, regardless of any inquiry as to their reasonableness, and when in fact they were reasonable, saving only an arbitrary and final power in the Railroad Commission of Kentucky, not subject to judicial review, to relieve from the operation of such requirement, such laws would be an arbitrary interference with the Railroad Company's legitimate business, not promoting, or tending to promote, or in any wise related to or connected with, the general welfare of the State, or any person in the State, and would, therefore, impair the obligation of the Railroad Company's contract with the Commonwealth of Kentucky, and would deprive the Railroad Company of the right to use its property, and its property itself, without due process of law, and deny to it the equal protection of the law. It was also alleged that the law of Kentucky, so construed, would necessarily involve an unlawful interference with commerce between the States, in conflict with the Constitution of the United States, and with the Interstate Commerce Act. The court sustained a demurrer to Paragraph 4.

A reply was filed traversing some minor matters in the first paragraph of the answer, and thereupon, upon Eubank's motion and over the objection of the Railroad Company, the court upon the pleadings and exhibits awarded Eubank judgment against the Railroad Company for $188.81 and costs. This judgment was rendered without allegation or proof that Eubank had sustained any damage, and when in fact he had paid only a reasonable rate; without any showing that he would have obtained any less rate if the law as construed by the Court of Appeals had been complied with; when even according to that construction Eubank would have had absolutely no right to compel a reduction in his rate, since the Railroad Company had the right to comply with the law as well by raising the long-haul rate as by lowering the short-haul rate; and when it appeared without dispute that the Railroad Company would have complied with the law, if it had understood that law to be applicable, by increasing the long-haul rate. In other words, while according to the lower court's construction there was a technical violation of the law on the part of the Railroad Company, there was nothing whatever to show that that violation had in any wise affected Eubank's status, or put him in any worse position than he would have occupied if the law had been complied with. Thus the court awarded Eubank a judgment in a private

action on account of a public offense, although there was not the remotest suggestion of special injury sustained by him.

We contend that the court erred in overruling the special and general demurrers to the petition; in sustaining demurrers to paragraphs 2 and 4 of the answer, and in giving judgment for the plaintiff, thereby enforcing Section 218 when so construed as to make it a regulation of interstate commerce, and, in addition, an arbitrary interference with the Railroad Company's contract rights, and with its rights under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

As applied by the lower court, Section 218 prohibits charging more on tobacco from Franklin, Ky., to Louisville, Ky., than from Nashville, Tenn., to Louisville, Ky., unless the Railroad Commission of Kentucky shall authorize the less rate from Nashville to Louisville. Such application of the provision is in direct contravention of the commerce clause of the Federal Constitution, and is even more obnoxious thereto than was the Illinois statute condemned in Wabash, &c., R. Co. v. Illinois, 118 U. S. 557, for that statute only purported to operate upon that portion of the interstate rate which actually accrued within the State, while here the entire rate from Nashville to Louisville is regulated by the Kentucky law and put under the dominion of the Railroad Commission of Kentucky. Moreover, when the Illinois case just referred to arose, Congress had never legislated relative to interstate rates, while before this case arose Congress had controlled that whole subject by the Interstate Commerce Act; the very rate from Nashville, Tenn., to Louisville, Ky., which it was contended could not be charged without authority from the Railroad Commission of Kentucky, was established in accordance with the Interstate Commerce Act, and by virtue of that act it would have been unlawful for the Railroad Company to have charged either more or less than the rate thus duly established. Gulf, &c., R. Co. v. Hefley, 158 U. S. 98. The rate from Nashville to Louisville being an interstate rate, must besides, bear a due and proper relation to other interstate rates, so as to work no undue preference under the Interstate Commerce Act. Its proper adjustment under the Act of Congress would be hopelessly hampered if it must also be adjusted with reference to the laws of Kentucky, and, of course, the Tennessee laws would have an equal application thereto.

The lower court seemed to proceed upon the theory that Sec. 218 operated solely upon the intra-state rate from Franklin, Ky., to Louisville, Ky., and simply made that rate unlawful if it exceeded the rate for the longer distance over the same line in the same direction, including the distance from Franklin, Ky., to Louisville, Ky., and that therefore there was no regulation of interstate commerce, even though

one of the longer distance points, or, for that matter, both of them, should be outside of the State of Kentucky.

No such theory can get around the practical regulation of interstate commerce which results from its application, or elude the principles established by this Court in the Illinois case in 118 U. S. just cited. In that case this Court said:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. . . . It was to meet just such a case that the commercial clause in the Constitution was adopted. . . .

"It can not be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it that the commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. Cook v. Pennsylvania, 97 U. S. 566, 574; Brown v. Maryland, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce. . . .

"Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous

track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car load, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York."

If the Railroad Company can establish no rate from Nashville, Tenn., to Louisville, Ky., less than the rates from local points in Kentucky to Louisville, no matter how strenuous the competition at Nashville may be, without either cutting down all its intermediate rates in Kentucky to the same extremely low competitive basis, or getting the consent of the Railroad Commission in Kentucky, clearly the State legislation imposes a direct burden upon interstate commerce and interferes directly with its freedom. Such State legislation would necessarily influence the carrier's conduct to some extent in the management of his business between Nashville, Tenn., and Louisville, Ky., and such commerce would not be free from the restraints imposed by the State of Kentucky. The State legislation thus becomes a regulation which affects the compensation for which such interstate commerce shall be carried.

The examples suggested by this Court in the Illinois case find their parallels here. A citizen of Nashville has tobacco which he desires to have transported by the Railroad Company from that city to Louisville, Ky., and undertakes to make a contract with the Railroad Company for that purpose. But the Railroad Company is not permitted to make a contract at the rate legally established in accordance with the laws of Congress, and at which the Nashville shipper can secure the transportation by other lines, simply because it

may be charging a higher rate in Kentucky. Such shipper would, therefore, either be compelled to pay at the rate of twenty-five cents per hundred pounds, because such rate is required by the law of Kentucky on account of the Railroad Company having received a rate of that amount from a person residing in Kentucky, or he would have to abandon this practicable and desirable route of interstate transportation and employ some other line instead.

If Section 218 is susceptible of the application given to it by the lower court, its operation will be extremely varied, and in every instance its direct effect will be to hamper and, as a rule, to destroy interstate commerce, which is of the greatest value both to the carriers and the public. Nashville, Tenn., and Evansville, Ind., are both important markets, and both upon navigable streams, and there is practicable navigation from one to the other. They are connected by one railroad, extending from Nashville, Tenn., to the Kentucky State line at Guthrie, Ky., and thence north across Kentucky to Henderson, and thence into Indiana to Evansville. No matter how severe may be the competition with boats between Nashville and Evansville, or how desirable it may be to the Railroad Company or beneficial to the public for the Railroad Company to meet such competition, no commodity can be carried by rail from Nashville to Evansville, or Evansville to Nashville, at a rate to meet that competition, unless the Railroad Company is willing to reduce all its rates on the same line between points in Kentucky, which are in no wise affected by such competition, to the same extremely low basis, or unless the Railroad Commission of Kentucky shall authorize the charging of the less rate from Nashville to Evansville, and from Evansville to Nashville. It is not improbable that the Railroad Commission of Kentucky, in a desire to facilitate commerce at Henderson, Kentucky, at the expense of Evansville, would grant permission to charge less from Nashville to Henderson, and from Henderson to Nashville, and withhold such consent with reference to Evansville, although Evansville and Henderson are affected by precisely the same conditions.

Cincinnati derives an important portion of its coal from mines in the State of Kentucky, situated on the lines of the C., N. O. & T. P. and the L. & N. Railroads. On account of the severe competition at Cincinnati with river coal and coal from other places, such coal from Kentucky mines if carried to Cincinnati at all must be carried at extremely low rates, and it is so carried, thus greatly benefiting the Kentucky mines and giving Cincinnati an additional source from which to draw its coal. Yet, under such construction of Section 218, this traffic must be abandoned unless the railroad companies can afford to reduce their rates on coal from those mines to all points in Kentucky on the same lines to the same low basis as the extremely low rates to Cincinnati (which the companies can not do), or unless the Railroad Commission of Kentucky shall permit such lower rates to be charged from the Kentucky coal mines to Cincinnati, Ohio. If the Railroad Commission of Kentucky should desire to facilitate coal trade at Covington and Newport, Ky., and not to encourage such trade at Cin-

cinnati, Ohio, it would quite probably give the consent with reference to Covington and Newport, and withhold it with respect to Cincinnati.

Such examples might be multiplied indefinitely with reference to every railroad passing through the State of Kentucky.

If the lower court's theory be upheld, it can not be restricted to long and short haul laws, but will apply to all regulations on the subject of rates. Section 818, Ky. Stats., prohibits any railroad company giving any locality any undue or unreasonable preference or advantage over any other locality. If the same rate should be charged from Nashville, Tenn., to Louisville, Ky., as is charged from Franklin, Ky., to Louisville, Ky., it might still be contended that Franklin, Ky., was subjected to an undue prejudice because charged the same rate for a shorter distance, and that the Railroad Company must re-adjust its rates to Louisville from Nashville and Franklin, respectively, in order to correct this undue preference.

The agricultural country immediately surrounding Guthrie, Ky., may ship its products to Louisville, Ky., or Memphis, Tenn., over one line of the Railroad Company, or to Evansville, Indiana, or to Nashville, Tenn., over another. The Kentucky courts might in like manner pronounce that the rates on these lines favored Evansville or Nashville or Memphis, or all of them, at the expense of Louisville, and require their re-adjustment under the Kentucky undue preference section, claiming all the time that they were simply exercising their jurisdiction over the rate to Louisville.

Countless instances might be cited on every railroad running through Kentucky where the Kentucky laws could be applied in this way so as to regulate interstate commerce, and in every instance the plea could be maintained, just as well as it can in this case, that the laws of the State are operating only upon the rates within the State, and yet the result in every instance would be a direct burden upon and interference with interstate commerce, practically destroying the freedom of the carrier to make such rates for interstate commerce as are in the interest of that commerce and allowed by the laws of Congress on the subject.

A great deal of traffic passing over long distances in this country must move at phenomenally low rates, which are profitable to the carriers involved only because their expenses would be practically the same whether this additional traffic were picked up or not, but still the traffic is in this sense profitable to the carriers, and is of the very highest value to the public. Yet every such rate might become impossible, notwithstanding any thing Congress might enact to the contrary, if each State through which that traffic passes could so legislate as to enforce any given relation between the rates on such traffic and the rates on traffic purely local to that State.

The policy of Congress not to destroy but to protect legitimate competitive interstate traffic, as manifested in the Interstate Commerce Act, and as pointed out by this Court in numerous cases, notably in Int. Com. Com. v. R. Co., 145 U. S. 263; T. & P. R. Co. v. Int. Com. Com., 162 U. S. 197, and Int. Com. Com. v. Ala. Mid. R'y Co., 168 U. S. 144, could be wholly thwarted by State action if State

laws be given the application which the lower court has given to Sec. 218. Interstate rates, instead of being made in conformity with the principles of the Interstate Commerce Act, and in the legitimate and beneficial development of interstate traffic, would have to be made with reference to the laws of the several States, and in so far as the railroad companies might be unable to make such adjustment of their intra-state rates as would permit them to continue their interstate traffic without violating State laws, they would have to abandon the interstate traffic.

Section 218, as applied by the lower court and all other State laws on the subject of rates applied on the same theory in this way, virtually amounts to a tax upon interstate commerce, or to a penalty for engaging in it. If the lower court has correctly applied the law, the State of Kentucky can say and does say to the Railroad Company: "You may engage in carrying tobacco from Nashville to Louisville, provided that in return for this privilege thus given you you reduce all your rates between points in Kentucky on the same line to Louisville to the same figure. If you can not afford to make this reduction, then you can not engage in the interstate traffic unless the Railroad Commission of Kentucky shall grant permission for you to do so." The State of Kentucky has no power to give or withhold the privilege of engaging in traffic from Nashville, Tenn., to Louisville, Ky. If not, then it has no power to impose any condition or burden as the price of engaging in such traffic, nor can it delegate to its Railroad Commission the power to say when such interstate traffic shall be and when it shall not be carried on.

Suppose the Railroad Company engages in important competitive traffic over the interstate haul from Nashville to Louisville at a very low rate, necessitated by unavoidable competition, the conditions being such that under the Interstate Commerce Act it may lawfully charge higher rates for shorter intermediate non-competitive hauls. On the same principle it charges higher rates for the shorter intermediate non-competitive hauls lying wholly in the State of Kentucky. Those higher rates may be just and reasonable and give the Railroad Company only a fair return on the fair value of its investment. To reduce such rates to the basis of the Nashville-Louisville rate would entail a loss of, say, $50,000 per year. If Section 218 has been correctly applied, it amounts to this: The Railroad Company must raise its interstate rate in obedience to the command of the State of Kentucky; or it must get authority from the Railroad Commission of Kentucky to charge the low interstate rate; or it must forfeit $50,000 per year for engaging in the interstate traffic. Any possible operation of Section 218 is therefore necessarily in conflict with the commerce clause of the Federal Constitution.

The entire separation of intrastate and interstate traffic has been strikingly illustrated by this Court in the case of Smyth v. Ames, 169 U. S. 466, 541, in speaking of the contention that in determining the reasonableness of the rates established by the Nebraska Statute the earnings of the railroads from interstate traffic should be taken into consideration. The Court said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. *It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business.* The argument that a railroad line is an entirety; that its income goes into and its expenses are provided for out of a common fund, and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

But not only does the lower court's application of Section 218, under a pretense of regulating purely intrastate rates, impose a condition upon which such interstate business shall be enjoyed, and restrict the freedom of such commerce, but it would absolutely destroy the interstate traffic involved in this case and severely competitive interstate traffic generally in the State of Kentucky, except so far as its continued enjoyment might be permitted by the State Railroad Commission. It is a matter of common knowledge that in the Southern States, on account of sparsity of population and the comparatively small amount of traffic, railroad companies can not possibly afford to handle all their local traffic at the extremely low rates which are necessitated at many points by reason of severe competition, due generally to the numerous navigable streams in that section; and if statutes such as that under consideration can have the effect given by the lower court, the result is that this interstate competitive traffic, which is admittedly handled not only without injury to the public, but to the advantage of the public as well as of the carriers, and which it has been repeatedly held is allowed by the Act of Congress, will be absolutely destroyed. Paragraph two of the answer directly alleges that if Section 218 be applied to the case presented, the result would be, not to reduce the rate from Franklin, Kentucky, to Louisville, Kentucky, but to raise the rate from Nashville, Tennessee, to Louisville, Kentucky (which means the destruction of that interstate competitive traffic), unless the Kentucky Railroad Commission shall authorize the maintenance of the interstate

rate at the lower figure. In this case, therefore, and generally in Southern territory, such application of such provisions would make the laws of the State control interstate rates and traffic as completely as if such laws in terms prohibited such traffic, or fixed the rates thereon, or delegated that power to their railroad commissions.

II.

Paragraph four of the answer, after showing that the tobacco traffic from Nashville to Louisville was legitimate competitive traffic carried at as high a rate as the controlling and unavoidable competition at Nashville would allow, and in nowise increasing the rate from Franklin to Louisville, which was just and reasonable in itself and not affected by similar competition, pleads that if Section 218 be so construed as to deny to the Railroad Company the right to engage in such competitive traffic except upon an arbitrary reduction of all intermediate rates to the same basis, or except at the arbitrary will of the Railroad Commission, it would impair the obligation of the Railroad Company's charter contract with the State of Kentucky to engage in legitimate railroad business, subject only to reasonable regulations in the proper exercise of the police power, and would deprive it without due process of law of its liberty to engage in a legitimate branch of railroad business and of a legitimate use of its property.

The court followed the construction of Section 218, which had theretofore been adopted by the Court of Appeals of Kentucky in the two cases of L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, and L. & N. R. Co. v. Commonwealth, 21 Ky. Law Rep. 232, which construed Section 218 as prohibiting carriers to engage in legitimate competitive traffic unless they arbitrarily reduce their intermediate rates, though just and reasonable in themselves, to the same low basis, or unless the Railroad Commission will permit the continued enjoyment of such legitimate competitive traffic, the Court of Appeals expressly holding that the power of the Railroad Commission in the premises is final and conclusive and free from judicial control. As thus construed and enforced, we contend that that section is void, because in contravention of the Federal Constitution in the particulars set out in the fourth paragraph of the answer.

This question is fully presented to this Court in the case of Louisville & Nashville R. Co., plaintiff in error, against Commonwealth of Kentucky, defendant in error, on the present docket of this Court as No. 93, and it is unnecessary to reiterate the argument here. It may be stated briefly that the arbitrary reduction of intermediate rates on the line of the long haul, without making corresponding reductions on other parts of the same railroad where the same conditions apply, and which are therefore entitled to the same rates for equal distances, is directly in conflict with the principle established in Lake Shore R'y Co. v. Smith, 173 U. S. 684; that arbitrary reduction of the intermediate rates in the absence of any investigation as to their reasonableness, and in such a way as to prevent the possibility of

the carriers' invoking judicial inquiry and protection, is directly in conflict with the principle which has been settled ever since the decision of C. M. & St. P. R'y Co. v. Minnesota, 134 U. S. 418, that a carrier is entitled to judicial protection against unreasonably low rates; that if instead of submitting to such arbitrary reduction of the intermediate rates the carrier elects to raise its competitive rates and thereby lose its competitive traffic, such operation of the law is obviously the destruction of a legitimate branch of railroad business, which is not injurious to the public, but is beneficial both to the public and the railroad company, and therefore unconstitutional, and it has been so held in *ex parte* Koehler, 23 Fed. Rep. 529; that to submit the whole matter to the Railroad Commission to decide in the exercise of an arbitrary power whether the Railroad Company shall be relieved of the unconstitutional operation of the section, without prescribing any rule by which the Commission shall be governed, and making the Commission's action final and free from judicial control, makes the section obnoxious to the principle laid down in the case of Yick Wo v. Hopkins, 113 U. S. 356.

The opinions of the Court of Appeals and dissenting opinions in the two cases just referred to will be found in the record and brief in case No. 93. It may be stated that of the seven judges of the Court of Appeals only four concurred in upholding Section 218 as constitutional with the construction above stated, and that Chief Justice Hazelrigg and Judges DuRelle and Burnam dissented on the ground that, so construed, the section was in conflict with the Federal Constitution in the particulars above indicated for the reasons that have just been briefly stated.

III.

With respect to the rate adjustment involved in this case, there would be, even theoretically, only three possible methods of complying with Sec. 218 as applied by the lower court.

1. By raising the rate from Nashville to Louisville. This method of compliance would make the section directly regulate and fix the interstate rate, and the section would, therefore, be admittedly in conflict with the Federal Constitution and with the Interstate Commerce Act.

2. The Railroad Company might apply to the Railroad Commission of Kentucky and get authority to charge the less rate from Nashville to Louisville. It is equally palpable that this would be a regulation of interstate commerce by State authority, and that the section, if it had this effect, would be in conflict with the Federal Constitution and the Interstate Commerce Act.

3. The Railroad Company might reduce its rate from Franklin to Louisville to 12 cents per hundred pounds. The Railroad Company pleaded that its rate from Franklin to Louisville of 25 cents per hundred pounds was only a just and reasonable rate for that service, and set up facts showing that the Nashville rate was an abnormally

low rate, the result of severe competition, and that it could not be taken as a criterion for the rate to Franklin. A demurrer to this paragraph of the defendant's answer was sustained. The Railroad Company was thus denied the right to show that the rate it charged was reasonable, and the rate which would be imposed upon it, if forced to reduce its rate from Franklin to Louisville, would be unreasonably low. This application of Sec. 218 results in fixing abnormally low rates upon carriers for short hauls, and denies to them absolutely any right to show that the rates charged are just and reasonable, or that the rates thus imposed are unreasonably low, and thus the section is in conflict with the Fourteenth Amendment of the Federal Constitution upon the principles settled in the case of Chicago, &c., R'y Co. v. Minnesota, 134 U. S. 418, and recognized ever since that time.

So far as this case is concerned, therefore, any possible application of the section as construed by the lower court puts it in direct and obvious conflict with the Federal Constitution.

But, for the reasons set forth in Section I of this argument, we confidently insist that the section as applied by the lower court is necessarily in conflict with the power of Congress over interstate commerce, even if its effect be to reduce the short haul intrastate rate, since even then it puts a direct burden and penalty upon engaging in interstate traffic.

And for the reasons briefly stated in Section II of the argument and set forth at greater length in the argument for plaintiff in error in L. & N. R. Co. v. Commonwealth, on the present docket of this Court, Section 218, as construed by the Kentucky courts, is an impairment of the Railroad Company's charter contract and in necessary conflict with the Fourteenth Amendment to the Federal Constitution, whether it reduces the short haul rate or destroys the competitive traffic or turns the carrier over to the arbitrary control of the Railroad Commission.

H. W. Bruce,

Walker D. Hines,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 10.—October Term, 1901.

The Louisville and Nashville Railroad Company, Plaintiff in Error,
vs.
T. R. Eubank, doing business under the name of T. R. Eubank & Company.

In error to the Circuit Court of Simpson County, State of Kentucky.

[January 27, 1902.]

The railroad company has brought this case here by a writ of error to the circuit court of Simpson County, State of Kentucky, that being the highest court of the State in which a decision could be had, for the purpose of reviewing the judgment of that court in favor of the defendant in error (plaintiff below) based upon a violation of section 218 of the constitution of Kentucky. That section reads as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section."

This action involves the question of the validity of the above section, as construed by the court below with reference to interstate commerce.

The plaintiff, T. R. Eubank, on June 9, 1899, duly filed in the clerk's office of the Simpson County circuit court a petition in which he alleged, in substance, that he was doing business in Franklin, in the State of Kentucky; that the defendant was a corporation chartered under the laws of that State as a common carrier, and that it owned and operated a line of railway for the transportation of freight and passengers from Nashville, Tennessee, running north through Franklin, Kentucky, and continuing

on to Louisville, Kentucky, a distance of 185 miles, and that the distance from Franklin, Kentucky, to Louisville, Kentucky, over the defendant's line is 134 miles, and is included in and a part of the distance of 185 miles from Nashville to Louisville; that during the years 1897 and 1898 the defendant transported tobacco for the complainant from Franklin, Kentucky, to Louisville, Kentucky, at the rate of 25 cents per one hundred pounds, and that during all this time the plaintiff was shipping and did ship and transport tobacco from Nashville, Tennessee, to Louisville, Kentucky, over the same road at the sum of 12 cents for one hundred pounds, and the complainant averred in his petition that the company had no right to charge him a greater freight rate for the transportation of tobacco from Franklin, Kentucky, to Louisville, Kentucky, than 12 cents per one hundred pounds, and he therefore brought suit to recover back from the defendant the difference between that sum and the sum paid by him, viz., 13 cents per one hundred pounds, the amount carried being 145,245 pounds.

The defendant tendered special and general demurrers to this petition on the ground, among others, that it sought to make a law of the State of Kentucky applicable to a rate charged by defendant from Nashville, Tennessee, to Louisville, Kentucky, and that if the law were so construed it would become a regulation of interstate commerce and be invalid, because in conflict with and repugnant to subsection 3 of section 8 of article I of the Constitution of the United States, and also in violation of the interstate commerce act.

These demurrers were overruled by the court, and thereupon the defendant tendered its answer, setting up its defenses in four separate paragraphs.

By paragraph 1 it substantially admitted the transportation of the tobacco at the rates stated in the plaintiff's petition. In the second paragraph it averred that its rate of 12 cents per one hundred pounds for the transportation of tobacco, from Nashville, Tennessee, to Louisville, Kentucky, was made under and in conformity with the act of Congress called the interstate commerce act, above referred to, and that in pursuance of the sixth section of that act the rate was printed, posted and kept open to public inspection and duly filed with the Interstate Commerce Commission, and that by virtue of that act it would have been unlawful for the defendant to have charged either more or less than the rate of 12 cents per one hundred pounds from Nashville, Tennessee, to Louisville, Kentucky. The defendant further averred that section 218 of the constitution of the State of Kentucky applied only to a railroad in that State, and had no application to that portion of any railroad that was without the State of Kentucky, and hence had no application to the railroad of the defendant between Nashville, Tennessee, and the State line between Tennessee and Kentucky; and it was averred that the rates which the defendant might

charge from Franklin, Kentucky, to Louisville, Kentucky, were not and could not become unlawful under the long and short haul laws of Kentucky by reason of any rates that might be charged by the defendant on traffic transported from Nashville, Tennessee, to Louisville, Kentucky, and that the long and short haul laws of Kentucky could apply only when both the long and short hauls were within Kentucky, and that the hauls from Nashville, Tennessee, to Louisville, Kentucky, were not within the jurisdiction of Kentucky.

Defendant further averred that at the times named in the petition it charged no rate on tobacco to Louisville, Kentucky, from any point in the State of Kentucky on the same line with Franklin and farther from Louisville, than Franklin, less than the rate of 25 cents per one hundred pounds charged by it from Franklin to Louisville. It was further averred that if the constitutional provision in question were so construed as to make this rate of 25 cents per one hundred pounds from Franklin, Kentucky, to Louisville, Kentucky, unlawful by reason of the less rate charged by it from Nashville, Tennessee, to Louisville, Kentucky, the result would be to regulate commerce among the States by the long and short haul laws of Kentucky and to compel the defendant to and it would raise its rates of 12 cents per one hundred pounds from Nashville, Tennessee, to Louisville, Kentucky, unless it could obtain the authority from the railroad commission of Kentucky to charge the less rate from Nashville, Tennessee, to Louisville, Kentucky; that thereby the long and short haul laws of Kentucky would regulate commerce among the States and would be in conflict with and repugnant to the interstate commerce act, and also subsection 3 of section 8, article I, Constitution of the United States, and would therefore be void; and there was contained in the paragraph the following averment, that "the defendant hereby sets up, pleads and relies on the right and privilege secured to it by the said act of Congress and by said provisions of the Constitution of the United States to have its interstate traffic and the commerce conducted among the States and between Kentucky and Tennessee regulated by the Constitution and the laws of the United States and to be free from the regulation and interference of the Constitution and laws of the State of Kentucky."

By paragraph 3 the defendant set up the statute of limitations of the State of Kentucky.

By paragraph 4, the defendant averred that its rate on tobacco from Franklin to Louisville during the times mentioned was much less than the defendant's standard tariff rates for that distance, and that the less rate resulted from and was necessitated by the fact of competition existing at Franklin, Kentucky, which arose from the fact that tobacco could be and was hauled by wagon from Franklin, Kentucky, to Bowling Green, Kentucky, and then shipped to Louisville on boats plying the Green and

Barren and Ohio Rivers at extremely low rates of transportation, and on account of competition the defendant had to and did accept the rate of 25 cents per one hundred pounds; that, but for that competition, it would and could have charged a much higher rate, which higher rate would have been just and reasonable, and that the rate of 25 cents per one hundred pounds was just and reasonable in itself by reason of the competition.

It was further averred that Nashville, Tennessee, was situated on the Cumberland, River, navigable by boats plying between Nashville and various points on the Ohio River, including Louisville, Kentucky, and that these boats transported tobacco from Nashville to Louisville at extremely low rates of transportation, and that by reason of this water competition Nashville enjoyed extremely low rates for the shipment of tobacco to Louisville and many other places, and if the defendant, at any of the times mentioned, had charged more for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, than 12 cents per one hundred pounds, it would not have secured the transportation of any of said tobacco from Nashville to Louisville, but the same would have been shipped from Nashville to Louisville, or some other tobacco market, at rates less than 12 cents per one hundred pounds, and thereby the defendant would have wholly lost the transportation of any tobacco from Nashville to Louisville, and that the defendant succeeded in obtaining, even at the low rate of 12 cents per one hundred pounds, the transportation of only 12 hogsheads of tobacco from Nashville to Louisville during the time named in the petition. It was averred that the tobacco transported by the defendant from Nashville to Louisville was transported under the circumstances and conditions thus stated, and that none of the same could have been transported at any higher rate than 12 cents per one hundred pounds, and that at none of the times mentioned in the petition was the transportation of tobacco from Franklin to Louisville affected by the circumstances or conditions set forth regarding the transportation of tobacco from Nashville to Louisville, and that the competition at Nashville differed substantially from the competition at Franklin, in that it was far more effective and necessitated a much lower rate, and that in making the difference in rates between Franklin and Nashville the defendant simply recognized the substantial difference in the circumstances and conditions of the transportation from and to the two places.

It was also averred that it was to the advantage of the defendant to transport the tobacco that it might secure from Nashville to Louisville at the rate of 12 cents per one hundred pounds rather than lose such transportation altogether, as it would have done if it had attempted to charge more than the rate of 12 cents per one hundred pounds, but the fact that the defendant did transport tobacco from Nashville to Louisville at 12 cents

per one hundred pounds did not increase the rate that it charged from Franklin to Louisville or make the rate from Franklin to Louisville any higher than it would otherwise have been, and that if it had refused to transport tobacco from Nashville to Louisville for any less rate than the rate charged from Franklin to Louisville, the Nashville shippers of tobacco could and would have shipped it to Louisville or other tobacco markets over routes which this defendant could not control and at rates not exceeding 12 cents per one hundred pounds, and that the defendant could and did engage in the transportation of tobacco from Nashville to Louisville at the rate of 12 cents per one hundred pounds without in anywise injuring Franklin or any person or interest at Franklin.

Other defenses were set up not now material.

The plaintiff demurred to paragraphs 2, 3 and 4 of the defendant's answer, which demurrer was sustained by the court. The plaintiff then moved for judgment for the plaintiff upon the pleadings, which motion, under objection by the defendant, the court granted, and thereupon it was adjudged that the plaintiff recover of the defendant the sum of $188.81 and his costs.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The writ of error in this case does not bring up for review any judgment of the Court of Appeals of the State of Kentucky, the highest court of that State. It appears that the circuit court of that State is the highest court in which a decision of the case could be had, presumably on account of the amount of the judgment. There was no opinion delivered by the judge holding the court in which the case was tried, and as the case did not go to the highest court of that State, we are without the benefit of any written opinion of the courts of Kentucky in regard to the question involved. We have already held, in the case of the *Louisville & Nashville Railroad Company* v. *Kentucky*, *supra*, page ——, that the section of the Kentucky constitution above set forth, as applied to places, all of which are within the State, violates no provision of the Federal Constitution.

The effect of the decision by the State court now under review is to hold that the provision of section 218 of the State constitution is not confined to a case where the long and short hauls are both within the State of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both of which are within the State, and the question is whether the provision of that constitution as thus construed is or is not a violation of the commerce clause of the Constitution of the United States.

It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the State, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. The claim must be that the only effect of the provision is to regulate the rate between points within the State and that it has no direct effect upon nor does it in any degree regulate or affect the rate between points outside and those points which are within the State. The contention is that the State does not prescribe or regulate the rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the State of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul way be between a point outside and one inside of the State; that this does not constitute an interference with or a regulation by the State of interstate commerce, and hence the provision is valid.

If this contention were correct, and the constitutional provision, as construed by the State court, did not by its enforcement regulate or immediately and directly influence and affect the interstate commerce of defendant, either as to amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?

By the demurrer and the motion for judgment on the pleadings it is admitted that the rates from all points on the defendant's road within the State of Kentucky to Louisville for the transportation of tobacco are not too high, but are in fact just and reasonable in themselves, and to that extent the general obligation of a carrier to make charges that are just and reasonable is fulfilled. There is also a rate for the transportation of tobacco from Nashville, to Louisville of 12 cents per one hundred pounds, and that rate is arrived at because of the existence of water competition between the two points which absolutely prevents the company from making a greater charge, for if it did it would get no business, and yet on account of the fact that trains are to be run in any event and expenses incurred by reason of the operation of the road, it pays the company to take the tobacco at the rate named, even though it is below what would otherwise be a fair and reasonable compensation for the transportation. It follows, therefore, and the fact is averred, that although under the circumstances it pays the company to transport the tobacco from Louisville at the rate of 12 cents per one hundred pounds, yet if it were confronted with the alternative of either giving up such transportation (which a charge of 25 cents per one hundred pounds would necessarily result in) or of reducing the charge from Franklin to Louisville to 12 cents per one hundred

pounds for tobacco, it would be compelled to give up the transportation from Nashville rather than reduce the charge from Franklin to Louisville. If the State of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation or even the suppression of the interstate commerce of the carrier, then this provision is valid; otherwise, it would seem to be the reverse.

That the railroad commission is authorized upon application to permit the company to charge less for longer than for shorter distances, is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose, it might permit the interstate charges to remain. In either case the interference is illegal.

The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the State, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject matter of the provision, the greater sum for the shorter distance within the State being compared with the lesser sum for the longer distance without the State; and the prohibition is absolute unless the consent of the commission is obtained, from charging any more for the shorter distance within the State than for the longer distance partly within and partly without the State. And in this case, in order to maintain its State rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce

is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.

Although not exactly in point, yet the case of *Wabash &c. Railway Company* v. *Illinois*, (118 U. S. 557,) is somewhat analogous in principle. In that case chapter 114 of the Revised Statutes of Illinois, section 126, came under consideration. That section enacted that if any railroad corporation should charge for the transportation of freight, &c., upon its railroad, for any distance within the State, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger, &c., over a greater distance of the same road, such charges should be deemed *prima facie* evidence of unjust discrimination prohibited by the act, and penalties were provided for its violation.

An action was brought to recover for a violation of the provisions of the act, and in the declaration it was alleged that the company had charged Elder & McKinney for transporting goods from Peoria in the State of Illinois to New York city at the rate of 15 cents per one hundred pounds, and on the same day the company charged Bailey & Swannell for transporting another carload of the same kind of goods from Gilman in the State of Illinois to the city of New York at the rate of 25 cents per one hundred pounds, although the carload transported for Elder & McKinney from Peoria was carried eighty-six miles further in the State of Illinois than the other carload of the same weight, and it was claimed that as the freight was of the same class in both instances and carried over the same route, except as to the difference of distance, a discrimination against Bailey & Swannell was made in the charges against them as compared with those given to Elder & McKinney, and hence suit was brought. Mr. Justice Miller delivered the opinion of this court, in which he expressed some doubt whether the statute of Illinois had been correctly construed by the court below, yet as that court had given an interpretation to it which made it apply to commerce among the States, although the contract was made within the State of Illinois and a part of its performance was within the same State, this court was held to be bound as to the construction given to the act by the State court. What that construction was is stated by the court itself. It said:

"We see no reason to depart from the conclusion reached in this case when it was here before. See *People* v. *W. St. L. & P. Railway Co.*, (104 Ill. 476.) But to avoid misapprehension, we deem it desirable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other State. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this State, to the city of New York, implies necessarily that that sum is charged proportionately for the

carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this State, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this State, a *prima facie* case is made out of unjust discrimination under our statute occurring within this State. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the State line proportionately with the balance of the line. The judgment is affirmed." *Wabash, St. Louis & Pacific Railway* v. *Illinois*, (105 Ill. 236.)

In regard to this question, Mr. Justice Miller, in the course of his opinion, said:

"It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?"

The court held it was the latter, and said, after examining the other cases (page 575):

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

In regard to the effect of the Illinois statute upon interstate commerce, it was further said:

"Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by the law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain

rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company had received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York."

Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that State, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it do not lower its State rates and in consequence must raise its interstate rates, in order to make its State rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?

In *Hall* v. *DeCuir*, (95 U. S. 485,) it was said: "But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The vice of the provision lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and those which are within the State.

The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed, where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the State might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The State might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the State than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result regulates the interstate transportation of a single

individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the State legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.

It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts in the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the State over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce, and if not, how can it be held an interference by the State when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.

In the case supposed, the States have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective State rates already, or from time to time, adopted by the State. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do, and on the other hand the State by such a statute regulates the local rate, but that it has the right to do.

Congress does not directly or indirectly interfere with local rates, by adopting their sum as the interstate rate.

In the case at bar the State claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance, to an interference with, and a regulation of, commerce between the States, carried on, though it may be, by only a single company.

We are of opinion that as construed by the State court, and so far as it is made applicable to or affects interstate commerce, the two hundred and eighteenth section of the constitution of Kentucky is invalid, and the judgment of the circuit court of Simpson County, Kentucky, is therefore reversed, and the case remanded to that court for such further proceedings therein as shall not be inconsistent with this opinion,

And it is so ordered.

Supreme Court of the United States.

No. 10.—October Term, 1901.

The Louisville and Nashville Railroad Company, Plaintiff in Error, *vs.* T. R. Eubank, doing business under the name of T. R. Eubank & Company.	In error to the Circuit Court of Simpson County, State of Kentucky.

[January 27, 1902.]

Mr. Justice Brewer, with whom concurred Mr. Justice Gray, dissenting.

I am unable to concur in the opinion and judgment in this case. We have just held that section 218 of the Constitution of Kentucky and section 820 of the Kentucky Statutes, based thereon, are not in conflict with the Constitution of the United States when applied to a case in which both the long and the short haul are wholly within the State. (*Louisville & Nashville Railroad Company* v. *Commonwealth of Kentucky, ante*, p. ——.) The constitutional section, briefly stated, forbids a carrier from charging more for a short than for a long haul within which the short haul is included. The prohibition is upon the short haul charge. There is no prohibition in respect to the long haul charge, no restriction of the power of the carrier over it, no regulation concerning it, no prescribing by whom or how or when it shall be made—all this is absolutely untouched by the section.

The proposition now advanced is that while the State may constitutionally prohibit a short haul charge in excess of a long haul charge, it can do so only when both hauls are within the limits of the State. Nothing in the section makes such limitation. Nothing in the Federal Constitution, in terms at least, restricts the power of the State in this respect over its internal commerce. This question may arise under either of two conditions: one in which Congress has prescribed the interstate rate, and the other in which it has left the matter to be fixed by the carrier.

Considering the first of these conditions, suppose Congress in the exercise of its power over interstate commerce should enact that all interstate passengers be charged exactly four cents a mile, and the railroad company, while obeying that statute in its charges for carrying passengers from Nashville to Louisville, should from Franklin to Louisville charge five cents a mile, could it be pretended that the prohibition of the State constitution against charging more for a short haul than for a long haul was

not operative because an interference with interstate commerce? Has the State no power to compel its corporations to give to parties traveling within its limits the same rates and privileges that Congress prescribes for interstate passengers? And can it not do so by simply prohibiting a greater charge for a long than a short haul clause? In other words, is it interfering with interstate commerce when the State, not prescribing the charges for interstate travel, simply requires that the passenger shall be charged no higher rates for local travel?

The form in which the State legislation is cast cannot be vital in determining the question of power. If an act, which in terms prescribes a rate per mile for local travel the same as has been prescribed by Congress for interstate travel, is within the power of the State, (and that it is cannot be doubted,) surely one accomplishing the same thing by simply forbidding the carrier to charge more for a short than for a long haul is likewise within its power. The State is merely using the standard fixed by Congress and enforcing that standard in respect to local rates. In *Miller's Executors* v. *Swann*, (150 U. S. 132,) it was held that the construction of that part of the State statute which authorized the disposal of the State's lands in accordance with the provisions of the public land laws of the United States involved no Federal question. The reference to the land laws of the United States was simply by way of selecting a standard.

But if a State may select as a standard the interstate rates prescribed by Congress and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the State respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the State when like action by Congress in the exercise of its constitutional power does not.

It must be borne in mind that there is here no question of reasonableness of rates. It is true the carrier avers that the rate of 25 cents per 100 pounds from Franklin to Louisville was just and reasonable, but it also avers that it made that charge only by reason of water competition, whereas "but for that competition the defendant would and could have charged a much higher rate, which higher rate would have been just and reasonable." According to these allegations, while 25 cents was a just and reasonable rate, a much higher rate would also be just and reasonable; and it is nowhere alleged that a rate of 12 cents—that from Nashville to Louisville—would have been unreasonable as a rate between Franklin and

Louisville. If invalid at all, it is not because it is no higher than the rate between Nashville and Louisville, but because it is in and of itself unreasonably low for the services rendered. As the amount of tobacco which the defendant shipped from Nashville to Louisville between February 23 and July 15 was only 12 hogsheads, weighing 20,910 pounds, and paying $25.09 freight, it is obvious that the loss of this entire amount of freight would not have worked a confiscation of the defendant's railroad property, if that be the test of reasonableness so far as the power of the legislature over rates is concerned, though as to the true test of reasonableness see *Cotting* v. *Kansas City Stock Yards Co.*, (183 U. S. 79.)

The question may be looked at in another light. The railroad company avers that it made its rate of 12 cents from Nashville to Louisville in conformity with the act of Congress; that the said rate was duly printed, posted and kept open to public inspection, and that by virtue of the interstate commerce act it was unlawful for it to charge either more or less than the rate of 12 cents from Nashville to Louisville. Suppose the legislature of Kentucky, accepting that statement as correct, should pass an act in terms prohibiting this company from charging more than 12 cents from Franklin to Louisville, who would undertake to say that such act was unconstitutional without evidence that in and of itself the rate of 12 cents was unreasonable within some recognized definition of reasonableness? Does the act become *prima facie* unconstitutional because, instead of naming 12 cents, the legislature forbids the carrier from charging more than 12 cents which the carrier has fixed as its rate from Nashville to Louisville?

Again, Louisville is on the northern border of the State, and the route of defendant's railroad extends through the State and thence southward to Nashville. Every place on the line of the road within the limits of Kentucky makes therefore, a shorter haul to Louisville than the haul from Nashville, and is included in the latter. Under the reasoning of this opinion the State of Kentucky has no power to prescribe a rate from any point within the State of Kentucky to Louisville which shall be less than the rate which the company has fixed from Nashville to Louisville. Nor are we to suppose that competition between Nashville and Louisville is limited to the matter of the transportation of tobacco. It is a competition between water and railroad transportation, and naturally extends to all articles of freight as well as to passengers. By the reasoning of the opinion the State of Kentucky would be powerless to compel the Louisville and Nashville Company to charge a less than the competitive Nashville rate, no matter how reasonable, from any point within its borders to Louisville. It does not seem to me that much is left of State control over local rates.

In the opinion of the court it is said:

"The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. . . . We fully recognize the rule that the effect of a State constitutional provision, or of any State legislation, upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without than State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

The fallacy of this is that it makes transportation by the Louisville and Nashville Company essential to commerce between Nashville and Louisville. The burden of the complaint on the part of the company is that there is competition at Nashville for the transportation of tobacco to Louisville, and that it must make a low charge to get a share of that transportation; not that the tobacco will not be transported, not that commerce will be interfered with, but that this company will lose some portion of that transportation. In other words, the power of the State of Kentucky over this corporation, which it has created, in respect to local rates, is denied in order that the corporation may obtain some portion of interstate transportation. I think we may well recall what was said only three weeks since by this court in the opinion in the case referred to of this same company against the Commonwealth of Kentucky:

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a State. (*Erie R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 439; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150.)"

Another matter is worthy of consideration. Suppose that Congress enacts that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts of the through line within their borders. Will it be contended that this is an interference with the power of the State over local rates? Does the mere fact that Congress accepts the local rates and makes them the basis of an interstate rate make it an interference by Congress with local commerce? And if that be not so, how on the other hand can it be held that a mere recognition by the State of

existing interstate rates as a basis for its legislation concerning local rate is an interference with interstate commerce?

I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the State it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing. In other words, if in the present case there was in fact no water competition between Nashville and Louisville, or if there was no tobacco shipped from Nashville to Louisville, I take it no one would seriously contend that the railroad company, by affirming that there was, could upset the provisions of the Kentucky legislation. There would be a question of fact to be determined, even according to the theory that competition in interstate rates has anything to do with local rates, and that question of fact might be presented in actions like the present, actions for overcharges, actions in which the parties would have the right to trial by jury. Suppose that one jury upon the testimony presented before it should find that there was water competition between Nashville and Louisville, and that there was tobacco shipped between the two places, and another jury upon the testimony introduced in a succeeding case exactly the contrary, is the legislation of Kentucky to be declared unconstitutional in one case and constitutional in the other?

It seems to me, in conclusion, that a State legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.

I am authorized to state that Mr. Justice GRAY agrees with this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.